Washoe Medical Center, Inc. *and* Operating Engineers Local No. 3, International Union of Operating Engineers, AFL–CIO. Cases 32–CA–17934–1 and 32–CA–18179–1

December 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On December 14, 2000, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed a response brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

We affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by continuing to unilaterally set starting wage rates for newly hired employees after the union election, without providing the Union with advance notice and an opportunity to bargain about these wages. We agree with the judge's application of *Oneita Knitting Mills*, 205 NLRB 500 (1973), in finding this violation, and with her view that *News Journal Co.*, 331 NLRB No. 177 (2000), is distinguishable.

In *Oneita*, the Board held that once employees choose to be represented by a union, their employer may not unilaterally discontinue a discretionary merit wage increase program. Further, the employer may not continue unilaterally to exercise its discretion in determining the amounts or timing of the merit increases. 205 NLRB at 500 fn. 1, quoted in pertinent part in the final section of the judge's decision.

In *News Journal Co.*, the issue was whether the employer unilaterally *discontinued* its discretionary practice of granting merit wage increases to selected employees when they completed their 90-day probationary period, without providing the union with advance notice and an opportunity to bargain about this alleged discontinuation. Unlike here, the General Counsel did not allege that the employer had violated the Act by failing to bargain over implementation of the discretionary aspects of the practice. The Board found that the employer did not in fact discontinue its practice. The Board found that the employer's decision to award post-probationary merit wage increases was discretionary, based on numerous criteria. However, the record failed to establish that employer officials applied different criteria after the advent of the union than they did before-hand. Thus the record failed to establish that the ongoing practice had been altered or discontinued. 331 NLRB No. 177, slip op. at 2.

Here, on the other hand, the issue is *not* whether the Respondent unilaterally discontinued its practice of establishing discretionary starting wage rates for newly hired employees based on numerous criteria. Rather, the issue is whether the Respondent failed to provide the Union with advance notice and an opportunity to bargain about the *implementation* of these discretionary wage rates, as required by *Oneita*, supra. We agree with the judge that the Respondent failed to do so.

Our dissenting colleague contends that the Respondent's policy and procedure for setting initial wage rates entails the consistent application of uniform standards and, thus, curtails its exercise of discretion. On the contrary, we agree with the judge that the procedure used by the Respondent to place new employees in a quartile within the wage range for the relevant position is in no sense automatic. Rather, it entails the application of a large measure of discretion. The Respondent is unfettered in its comparison of applicants' professional qualifications, experience, and specialty certifications and, importantly, the value it assigns to those criteria in rating the new hires relative to other departmental employees ("internal equity" factor). Such judgments are necessarily subjective, as it is unlikely that any two applicants or employees will be precisely comparable. It is this substantial degree of discretion, as well as the unavoidable exercise of such discretion each time the Respondent establishes a wage rate for a new employee, that requires the Respondent to bargain with the Union, pursuant to the Board's holding in *Oneita*.

[1] There are no exceptions to the judge's recommended dismissal of the allegation that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing its policy governing shift schedule changes in its labor and delivery department.

We affirm the judge's recommended dismissal of the allegation that the Respondent unlawfully failed to bargain before-the-fact, i.e., before the planned imposition of specific discipline on particular employees. The record does not establish that the Union at any time sought to engage in such before-the-fact bargaining.

In light of the Board's holding in *Oneita Knitting Mills*, 205 NLRB 500 (1973), discussed infra, we reject the judge's comment at the end of the third par. from the end of sec. III,A of her decision, that "[I]t is not sufficient that the General Counsel show only some exercise of discretion to prove the alleged violation; the General Counsel must also demonstrate that imposition of discipline constituted a change in Respondent's policies and procedures." (Footnote omitted.)

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Washoe Medical Center, Inc., Reno, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. December 20, 2001

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, dissenting in part.

Contrary to my colleagues, I would not adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally setting the starting wage rates for newly hired employees.

The judge found that, pursuant to the Respondent's existing policy and practice, it had applied objective criteria for determining the placement of new employees into one of four quartiles. Each quartile had an established wage range for a particular position.[1] The judge concluded that the Respondent's pay-setting policy vested it with "unfettered discretion" over the determination of the specific wage rate within a quartile. Accordingly, citing *Oneita Knitting Mills*,[2] the judge found that, in exercising its discretion to fix wages for new employees within a quartile range, the Respondent acted unilaterally in violation of Section 8(a)(5).

Under *Oneita*, if an employer has a wholly discretionary wage-determination policy prior to the advent of a union, the employer may not, upon certification of the union, unilaterally discontinue the policy, nor may it continue to exercise its unfettered discretion under that policy. However, in the instant case, the Respondent's policy was to place a new employee into a particular quartile, *based on objective criteria*. These criteria were: professional qualifications; prior experience; and specialty certifications. In addition, Respondent determined the precise wage rate within that quartile, *again based on objective criteria*, i.e., comparing her to other employees of the Respondent in terms of skills, qualification and experience.[3] In my view, the Respondent was privileged, indeed required, to continue the status quo, pending bargaining with the Union. That is what the Respondent did.

Concededly, the objective criteria involved herein do not lead to a mathematically precise result. That is, some discretion, within the criteria, must be exercised. However, it is not inconsistent with collective bargaining principles to have a system in which discretion is exercised under objective criteria.[4] Accordingly, the Respondent's policy was not unlawful.

Dated, Washington, D.C. December 20, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

Sharon Chabon, Atty., for the General Counsel.
Stephanie Dodge, of Chicago, Illinois, for the Respondent.
Matthew J. Gauger, Atty., of Sacramento, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This case was tried in Reno, Nevada, on October 3 and 4, 2000. Operating Engineers Local No. 3, International Union of Operating Engineers, AFL-CIO (the Union) filed the following charges: Case 32–CA–17934–1 on February 1, 2000,[1] Case 32–CA–18179–1 on May 24, and first-amended charge in Case 32–CA–18179–1 on August 18. Complaints and Notices of Hearing issued on March 31 and July 24 pursuant to the charges in Case 32–CA–17934–1 and Case 32–CA–18179–1, respectively, and an order consolidating the above cases issued July 24. The complaints allege that Respondent engaged in unfair labor practices within the meaning of Sections 8(a)(5) and (1) of the Act by implementing new starting wages for newly hired employees since November 1, 1999, changing its shift-trade policy on or about December 28, 1999, and issuing various disciplinary measures

[1] For example, the salary range for experienced nurses is $18.15 to $25.41 per hour; and the first quartile ranges from $18.15 to $19.97 per hour.

[2] 205 NLRB 500 (1973).

[3] Compare *Oneita*, supra at 502, where the wages were wholly discretionary, i.e., not based on wages paid to comparable employees.

[4] See *News Journal Co.*, 331 NLRB No. 177 (2000), in which the employer was privileged to have a system under which discretion was exercised under objective criteria. Indeed in that case, the discretion within those criteria was "highly subjective." I recognize that the General Counsel alleged in *News Journal Co.* that the employer had wholly discontinued a discretionary practice. My colleagues thus say that *News Journal Co.* is distinguishable because the General Counsel in that case did not allege a failure to bargain about the exercise of employer discretion. My colleagues thereby suggest the somewhat anomalous position that an employer can wholly discontinue a discretionary practice, but an employer cannot continue the status quo of such a practice.

[1] All dates are in 2000 unless otherwise indicated.

to unit employees commencing sometime after July 16, 1999, including disciplinary written warnings, a 1-day suspension, and subsequent termination to employee Terry DeVault (Ms. DeVault), the latter occurring on April 12, all without prior notice to or affording the Union an opportunity to bargain about said actions. Respondent's timely answers deny the commission of the alleged unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent, a corporation, operates an acute-care hospital at its facility in Reno, Nevada, where it annually derives gross revenues in excess of $250,000. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[2]

II. BACKGROUND

A. Representation History

A Board-conducted representation election was held among Respondent's employees in a unit of all full-time and regular part-time registered nurses, including graduate nurses awaiting licensing, and per diem nurses (all nurses who have worked an average of at least 4 hours a week during the quarter prior to the eligibility date), employed by Respondent at its Reno, Nevada facility (the unit), on July 14, 15, and 16, 1999. On October 21, 1999, the Union was certified as the exclusive collective-bargaining representative of the employees in the unit. Since December 1, 1999, Respondent and the Union have been engaged in negotiations for a collective-bargaining agreement covering employees in the unit. Pete Ford (Mr. Ford), was the Union's chief negotiator during all times material to this complaint. Stephanie Dodge (Ms. Dodge), Respondent's attorney, was chief negotiator for Respondent. In the course of negotiations, Respondent invited the Union to bring issues that involved bargaining unit employees to the negotiation table for discussion, and the Union did so from time to time.

B. Respondent's Written Policies and Procedures Corrective Action Policy

Since December 1993, Respondent has had a written policy and procedure identified as "Corrective Action, No. 605.810." It provides for five levels of corrective action to be followed "in the majority of typical circumstances" and while Respondent "reserves the right not to apply the following procedures in any given case at the discretion of management, all supervisors are encouraged to apply it under ordinary circumstances." Respondent also "reserves the right to utilize only portions of the…procedures, to skip certain types of corrective action in appropriate cases, or to discharge any employee, in the discretion of management, without first taking any other type of corrective action."

The types of corrective action include verbal counseling, written reprimand, suspension, demotion, reassignment, and termination. Section II of the policy and procedure classifies specific offenses in three levels of severity: type "A" offenses, type "B" offenses, and type C offenses. Representative offenses are delineated for each level, and the type of discipline is dependent on the type of offense.[3] Except for the disciplinary measures of suspension and termination, Respondent's supervisors use the "Corrective Action" policy as a framework to guide their judgment. Proposed suspensions and terminations require consultation with Respondent's Human Resources Department to ensure compliance with the policy.

2. Attendance and punctuality policy

Since January 1994, Respondent has had a written policy and procedure identified as "Attendance & Punctuality, No. 605.705." It notes Respondent's concern with abuse of paid sick leave, and in pertinent part, sets forth guidelines and thresholds for disciplinary action pursuant to the following attendance violations: unscheduled absences[4] and absences without approved leave.[5] Discipline is to follow the progression outlined in Corrective Action Policy 605.810, but it is

[2] Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

[3] Under Type "A," such conduct as tardiness, unexcused absence or failure timely to notify a supervisor of inability to report to work, loafing, solicitation of patients, failure to comply with dress code, unauthorized bulletin board use, and unsatisfactory work performance are listed as representative offenses. Under Type "B," careless use of company property, improper conduct, leaving work without permission, misuse of company records, giving false information to qualify for benefits, taking gratuities of a certain value, repeated absenteeism, failure to follow patient care standards, failure to support the culture statement, engaging in conduct which contributes to discord among employees, patients, or others dealing with the company, discourteous treatment of others, failure to report an accident, smoking in unauthorized areas are representative offenses. Under Type "C," inefficiency or incompetency, insubordination, misdemeanor or felony, willful damage of property, abuse of patients or other personnel, fighting, threats, possession of a lethal weapon or explosives, reporting for work while under the influence of proscribed substances, failure to cooperate with a search to reveal such proscribed substances, willful or negligent dangerous acts, conviction of serious crimes that would impact Respondent, unauthorized use of company property, dishonesty, fraud in securing employment, smoking in hazardous areas, falsification of records, gambling on premises, immoral conduct on premises, malicious gossip or attacks on personnel, making unauthorized notations on time cards, sleeping on duty, abandonment of position, certain harassment, holding a position elsewhere which constitutes a conflict of interest, failure to maintain licensure, refusal to care for patients, unauthorized disclosure of medical information, theft of company property, unauthorized change of time cards, any act which adversely affects staff, working conditions, or morale, unexplained failure to appear for work, breach of security, giving a false reason for leave, and unauthorized removal of a hospital uniform, are representative offenses.

[4] These are defined essentially as three or more absences without prior approval in six pay periods since the most recent unscheduled absence or more than sixty hours in any 12-month period.

[5] These are defined as absences for 3 consecutive days without appropriate notification.

noted that excessive absenteeism "may require accelerated discipline up to and including termination." Two examples of absences subject to disciplinary action are "1. A record of absenteeism occurring before or after scheduled days off. 2. Absences occurring on weekends or holidays scheduled as work days."

3. Nursing administration policy & procedures

A written policy identified as "Staffing" with an effective date of October 15, 1999, covers staffing procedures in each of Respondent's hospital units. Regarding changes in staffing schedules, it states: "Any change in the schedule must be submitted to Nursing Administration in writing on a schedule change slip and entered into the computer. Changes must be approved by the unit manager, staffing coordinator or designated nurse supervisor." A written policy identified as "Time Schedules" with an effective date of October 15, 1999, covers assigned workdays and hours of nursing staff members. In pertinent part, it provides that all changes in schedules, including trades, are to be in writing on a change slip and submitted to the Nursing Administration. Changes should be made at least 48 hours prior to the effective date and are at the discretion of the scheduling committee, manager, director, or by unit guidelines.

4. Salary administration

Since January 1, 1996, Respondent has had a written policy and procedure identified as "Salary Administration, No. 605.545." The stated policy and purpose are to compensate employees equitably and fairly. Uniform procedures for determination of employee compensation are set out. Section I.B states: "Salary grades and ranges are assigned based upon a formal evaluation of the position description, utilizing a single set of criteria applied uniformly to all jobs." The policy and procedure document sets out the evaluation process for ranking of jobs and competitiveness of salary structure, the latter dependent on salary surveys conducted at Respondent's discretion but at least yearly.

III. UNFAIR LABOR PRACTICE ALLEGATIONS

A. Alleged Unilateral Imposition of Discipline

Between the time the Union won the election and the hearing, Respondent imposed discipline ranging from an oral warning[6] to termination on an unspecified but extensive number of employees. At no time after the Union won the election or during the course of bargaining did Respondent notify the Union before it imposed discipline on any unit employee or offer to bargain about any discipline. Mr. Ford became aware of discipline meted to various employees when notified by the employees. Specifically, he was notified by employees, Terry DeVault (Ms. DeVault) and Susan Crump of discipline they received. The Union did not request that Respondent bargain with it over any of its disciplinary actions. During the course of negotiations, Mr. Ford discussed with Ms. Dodge, either by telephone or during negotiations, discipline given to approximately eight to ten unit employees. There is no evidence of the substance of these discussions.

Mr. Ford became aware of Ms. DeVault's December 8, 1999 suspension for attendance problems when Ms. DeVault informed him of it either before or shortly after the suspension. Mr. Ford requested an opportunity to participate in Ms. DeVault's appeal of the suspension. Respondent's Human Resources Director, Brian Moore, referred Mr. Ford to Ms. Dodge. Mr. Ford telephoned Ms. Dodge and brought up the subject at the next negotiation meeting. No evidence was introduced as to the substance of any discussion on this matter.

Ms. DeVault also notified Mr. Ford of her January 18 written warning and 3-day suspension and her March 14 suspension. In each instance, Mr. Ford contacted Respondent and sought to represent Ms. DeVault in Respondent's appeal process. On each occasion, Mr. Ford was denied opportunity to represent Ms. DeVault.[7]

Mr. Ford was notified by both Ms. Dodge and Ms. DeVault of the latter's April 12
Termination. Mr. Ford made no request to bargain concerning the termination.[8]

The Union submitted its initial proposal regarding employee discipline to Respondent on or about December 1, 1999. In its proposal, the Union requested that Respondent notify the Union of its intent to suspend an RN. Following discussion of the discipline proposal on five or six different sessions, the parties tentatively agreed on a contractual article entitled "Corrective Action." The agreed-to article vested the right to maintain discipline in Respondent. The proposal incorporated a progressive discipline procedure: verbal [sic] warning, written warning, suspension, and termination. Respondent was to give unit employees 24-hour notice of any investigatory meeting with an employee that might result in disciplinary action. The employee was thereafter responsible for contacting and making available a Union representative at such a meeting. Respondent was required to notify the Union within 3 working days after the issuance of a disciplinary discharge or suspension.

The Union also submitted a proposed management-rights clause to Respondent at the December 1, 1999 negotiation meeting. The proposed clause included the following provision as a right of management: "17. To reprimand, suspend, discharge or otherwise discipline RNs for just cause." The management clause as tentatively agreed to on June 7 gave Respon-

[6] Respondent's written policies and disciplinary action forms refer to "verbal" warnings but it is clear that oral warnings are meant.

[7] Mr. Ford requested, and was permitted, to represent employee Deb Weatherby by appearing with her at meetings between her and the reviewing supervisor and assisting in her presentation. No explanation was given as to the differing responses to Mr. Ford's requests to represent employees in pursuing their grievances. Of the eight to ten employees whose discipline Mr. Ford discussed with Ms. Dodge or other management personnel, he asked to represent five to six.

[8] Beginning in January, Ms. DeVault received additional notices of corrective action for stated violations of work performance standards and policies. A 3-day suspension imposed on Ms. DeVault on March 14 was later changed to a 1-day suspension, which Ms. DeVault took on March 29. Thereafter, Ms. DeVault filed a grievance through Respondent's internal grievance procedure, resulting in recision of the notice of suspension and back pay. She was terminated on April 12. There is no contention that her termination violates any provision of the Act.

dent the sole and exclusive right to "counsel, demote, suspend, discipline or discharge [employees; and] the right to maintain discipline and efficiency of its employees." Employee discipline is unquestionably a mandatory subject of bargaining,[9] and any alteration of a disciplinary system is also a mandatory subject of bargaining.[10] The General Counsel contends that Respondent exercised considerable discretion in disciplining its employees and is therefore required to notify and, upon request, bargain with the Union over each and every imposition of discipline, citing *Eugene Iovine, Inc.*, 328 NLRB 294 (1999), and *Electrical South, Inc.*, 327 NLRB 270 (1998). Both cases deal with an employer's obligation to bargain about discretionary actions affecting terms and conditions of employment. In *Iovine*, the Board, citing *NLRB v. Katz*, 369 U.S. 736, 746 (1962), held that the decision to reduce employee hours involved management discretion and required the employer to bargain with the newly certified union. In *Eugene Iovine, Inc.*, the Board specifically noted that the employer "failed to establish a past practice and further failed to establish that its … reduction of hours was consistent with its conduct in prior years." 328 NLRB at 294. In *Electrical South*, the Board noted that although the employer's "policy of granting merit pay increases ante dated the [u]nion's certification, the amount of the merit increases was discretionary." 327 NLRB 27at 270 fn. 1 (1998). The Board observed that the employer had exercised its discretion differently in prior years. In both cases, there was a demonstrable change from preceding practices.

The General Counsel is correct in pointing out that the discipline administered to unit employees by Respondent is, at least in part, discretionary. Employee discipline, regardless of how exhaustively codified or systematized, requires some managerial discretion. The variables in workplace situations and employee behavior are too great to permit otherwise. Here, Respondent's detailed and thorough written discipline policies and procedures long antedate the Union's advent. The fact that the procedures reserve to Respondent a degree of discretion or that every conceivable scenario leading to discipline is not specified does not alone vitiate the system as a past practice and policy. The General counsel does not contend that Respondent's discipline policies were unilaterally altered or unlawfully established, and the Union made no such accusation during negotiations.[11] Rather, the General Counsel asserts that notwithstanding the legality of the long-established policies, inasmuch as Respondent exercises a degree of discretion in implementing the policies, i.e., by setting individual discipline, it must notify and give the Union an opportunity to bargain over every instance of discipline from oral warnings to terminations. I cannot agree. It is not sufficient that the General Counsel show only some exercise of discretion to prove the alleged violation; the General Counsel must also demonstrate that imposition of discipline constituted a change in Respondent's policies and procedures.[12] The General Counsel has not done so.

The General Counsel introduced evidence of individual discipline imposed on unit employees since June 1999, a month before the election, and argues that the evidence shows, on its face, significant exercise of discretion in certain instances of discipline and, inferentially, arbitrary implementation or disregard of Respondent's established discipline procedures.[13] While the evidence may suggest that some employees were given different levels of discipline for similar infractions, it is not clear from the records alone that Respondent was not following its established policies and procedures or that it deviated from its past practice when imposing the discipline. The General Counsel elicited the testimony of only one employee witness, Ms. DeVault, whose testimony, even if credited, does not show any significant departure from past practice. The Union never requested bargaining over any of the employee discipline and only sought to assist certain employees in protesting their discipline through utilization of the internal company appeal process.[14] I do not find it necessary to reach the question of whether the Union waived any right to bargain under *American Diamond Tool*, 306 NLRB 570 (1992), by its failure to request bargaining about discipline of which it had actual notice, the lack of any evidence that Respondent would have refused to bargain upon request, and its agreement to the management rights and discipline provisions during negotiations. However, the Union's conduct may reasonably create an inference that it did not perceive Respondent's employee discipline to be a noteworthy departure from past practice.

Accordingly, the General Counsel has not met its burden of proving that Respondent violated Section 8(a)(5) and (1) of the Act by issuing discipline to various bargaining unit employees, including Ms. DeVault, without first notifying the Union and affording it an opportunity to bargain over the discipline.

B. Alleged Unilateral Change in Shift Trade Policy

The Union made a proposal regarding work hours and shift scheduling but made no specific request to bargain regarding

[9] *Crestfield Convalescent Home*, 287 NLRB 328 (1987); *Ryder Distribution Resources*, 302 NLRB 76 (1991).

[10] *Van Dorn Plastic Machinery Co*., 265 NLRB 864 (1982).

[11] During negotiations, the parties reached agreement on contract provisions covering discipline and management rights essentially consistent with Respondent's existing policies.

[12] See *Cotter & Co.*, 331 NLRB No. 94, slip op. at 3 (2000), where the Board, citing *Great Western Produce*, 299 NLRB 1004, 1005 (1990), noted that "the discipline or discharge of any employee violates Section 8(a)(5) if the employer's unlawfully imposed rules or policies were a factor in the discipline or discharge;" *Van Dorn Plastic Machinery Co.*, above at 3, where the Board stated: "the notification and enforcement of a *new* [absentee control] system is undeniably still a unilateral change in terms and conditions of employment." (Emphasis added.;) *Dynatron/Bondo Corp.*, 324 NLRB 572, 573 (1997), where discipline of employees who violated a "unilaterally instituted new rule" violated Section 8(a)(5) of the Act; and *Bath Iron Works Corp*, 302 NLRB 898 at 901 where the Board cited with approval the finding of *Trading Port*, 224 NLRB 980 (1976) that where the standards [of productivity/efficiency] and sanctions remained the same, the related "tightening of the application of existing disciplinary sanctions did not require bargaining with the union."

[13] The General Counsel provided a summary of the discipline evidence as Attachment A to his brief.

[14] The General Counsel does not argue, and I do not find, that Respondent violated the Act by refusing to permit Mr. Ford to participate in its internal appeal procedure.

the trading of shifts among employees in any individual hospital unit. During negotiations, the parties discussed the different practices and policies in effect in various departments, some being self-scheduled and some not.[15] The Union's position was that self-scheduling should be encouraged. The Union agreed that unless a specific concern arose as to the existing practice of scheduling in a particular department, of which the Union would notify Respondent, the existing staffing/scheduling procedure was appropriate. That procedure, at least in the labor and delivery department, also permitted shift trading among employees. The Union agreed to notify Respondent when it felt self-scheduling was not working. The Union never made any request or notification regarding scheduling in any department at any time material to the allegations herein. Respondent did not notify the Union of any change in its shift trade policy and procedures.

The only department at issue herein with regard to shift trade policy is the labor and delivery department. Mr. Ford testified that the Union was not satisfied with the operation of self-scheduling in that department. Nevertheless, the Union made no proposal to discontinue or modify any of the scheduling practices occurring in Labor and Delivery.

On June 29, 1999, Ms. DeVault received a notice of corrective action for the stated reasons of tardiness and sick leave use. Under the section entitled "Action Plan," the action to be taken states: "Terry will be here *ON Time* and will come as scheduled" On November 29, 1999, a notice of corrective action issued to Ms. DeVault again noted that the action plan was that "Terry will come to work as scheduled." On December 8, 1999, Tandy LaMountain (Ms. LaMountain,) the day shift supervisor, told Ms. DeVault that she would be suspended for 1 day without pay on December 15, 1999 because of tardiness and issued Ms. DeVault a notice of corrective action to that effect. Ms. DeVault did not take the suspension, but traded a day with a coworker and worked on the assigned suspension day. After consulting with a coworker about the necessity to notify management, Ms. DeVault sought no prior supervisory approval for the shift change. On December 28, 1999, Ms. LaMountain issued Ms. DeVault a written warning for insubordination in making the trade. On the same day, Respondent posted notices directing employees in the Labor and Delivery Department to obtain supervisory approval of shift trades. Mr. Ford testified that he became aware of these postings in the course of following one of Ms. DeVault's disciplinary matters. The Union never made a request to bargain regarding Respondent's posted policy on shift trading in the labor and delivery department.

Only one unit employee, Ms. DeVault, testified about the application of the shift trade policy and procedures. According to her, if the trade involved a straight across swap, (e.g., a straight exchange of shifts with another employee that did not alter the number of employees on either shift,) it was not necessary to get prior management approval. According to Ms. DeVault, approval was only required if the shift trade involved alteration of the number of employees scheduled on any shift. When pressed, however, Ms. DeVault said that in the past, there were occasions when Respondent was "holding more strictly to the rules," or would "post something and say you have to get prior authorization . . .," or it was "maybe announced in a staff meeting…," (held monthly) that employees were required to get some type of supervisor approval before they traded shifts.[16] She further admitted that although they did not always observe the rule, employees engaging in schedule trades were to fill out schedule forms to let the nursing office know someone other than the scheduled employee would be working and that the change in schedule form was to be signed by the person in charge.[17] Respondent's shift schedules show only sporadic initialing by supervisors next to shift trades.

Respondent's duty to avoid unilateral changes in wages, hours, and working conditions attached when the Union won the election on July 19, 1999. *Mitchellace, Inc.*, 321 NLRB No. 33 (1996); *Lovejoy Industries*, 309 NLRB 1085 (1992). Paragraph 10 (b) of the complaint in Case 32–CA–17934–1 alleges that on or about December 28, 1999, Respondent changed its former policy of allowing employees to trade shifts among themselves without the need for prior approval from management. The complaint does not allege that the written policy identified as "Staffing" with its stated effective date of October 15, 1999 constituted a unilateral change. Whether that is because the General Counsel mistakenly assumes the bargaining obligation had not yet attached on October 15, 1999, or whether it views the written policy as a statement of existing, albeit unenforced, rules is not entirely clear. However, inasmuch as the General Counsel in his brief states that notwithstanding the formal guidelines, "…Respondent, in its labor and delivery department did not require its Unit employees to ad-

[15] Self-scheduling is a system where nurse employees gather scheduling desires and information from other department employees, develop a schedule for a designated future period, obtain approval by management and employees, and post the scheduled work hours.

[16] Ms. DeVault later reiterated that a straight across swap of shifts, which didn't create an overtime situation, did not require preapproval.

[17] Ms. DeVault testified that the rule was pervasively disregarded and management was aware of general abrogation. She gave no concrete evidence to support her contention and admitted that at some point in the past (perhaps 2 years earlier,) Christy Collins, a supervisor of the Labor and Delivery department, required her to sign a paper in which Ms. DeVault acknowledged that she was required to obtain preapproval specifically from Christy Collins for any shift changes. Ms. DeVault insisted only she and another employee were required to sign such an acknowledgment, but her belief was based solely on her not having seen such a paper in employees' mailboxes and her questioning of a couple of coworkers. Regarding subsequent unrelated disciplinary actions, Ms. DeVault said she was accused of painting her fingernails while on duty when she had only "mended a broken nail." Under questioning, she then admitted having painted more than one nail, and doing it more than once. She agreed that in her sworn statement to the Board agent during the investigatory stage, she stated that "applying the nail polish to all the nails including the broken one took all of 30 seconds," but maintained that it was only the nails of one hand. I found Ms. Devault to be vacillatory and evasive in much of her testimony and given to inconsistent and unsubstantiated generalizations. I do not credit her testimony except where it is independently corroborated.

here to these requirements[,]" I will assume General Counsel takes the latter position.[18]

The General Counsel bears the burden of proof in demonstrating that Respondent unilaterally changed the procedures whereby it accommodated shift changes. The General Counsel has not met its burden. It is not sufficient for the General Counsel to present evidence that employees sometimes failed to follow the shift change requirements.[19] The evidence must show that Respondent's past practice was to accept unapproved shift changes and to overlook policy violations. Ms. DeVault testified of occasions when Respondent held more strictly to the rules, or posted "something" about prior authorization, or announced the policy in staff meetings. Her testimony, although inconsistent, suggests that the policy of requiring written notification and preapproval of shift changes had been in effect prior to the election. Periodic renewals or reminders of standing instructions do not constitute unilateral changes. *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996).[20]

The General Counsel asserts that Ms. DeVault received a written warning for insubordination when trading her suspension day, and that the written warning was a unilateral change in administration of the shift change policy. Respondent argues that there is no evidence to indicate discipline of any employee for failure to obtain preapproval, and that Ms. DeVault was disciplined for insubordination. Although the insubordination was connected to Ms. DeVault's conduct in trying to avoid the assigned suspension day, the evidence is clear that it was the evasion and not the shift change that motivated the suspension. The issue of unilateral imposition of discipline has been dealt with above and consistent with those findings, Respondent has not failed in its duty to bargain by its suspension of Ms. DeVault. Further, even assuming the evidence supports a conclusion that Respondent unilaterally changed or more strictly enforced its shift change format, it must be determined if the Union waived its right to bargain by its failure to object to any change or to request bargaining over it. The Union had specifically agreed to bring any scheduling concerns to Respondent's attention during negotiations. Mr. Ford was aware of the DeVault suspension and the December 28, 1999 posting regarding shift swaps. The Union did not bring up the subject during negotiations, and there is no evidence that Respondent would have declined discussion on this subject. Indeed, in agreeing that the Union could bring scheduling concerns to Respondent's attention, Respondent had signaled its willingness to discuss scheduling subjects, including shift swaps. If a bargaining right existed, I find that the Union waived it. *American Diamond Tool*, 306 NLRB 570 (1992). Accordingly, Respondent did not violate Section 8(a)(5) of the Act by changing its shift schedule change policy in its labor and delivery department.

Alleged Unilateral Change in Starting Pay Rates for Newly Hired Employees

Respondent neither notified the Union about the starting pay rates it was assigning to new employees following the Union election nor offered to bargain about them. During negotiations, on three different occasions, two of which took place in about March or April, the Union told Respondent that it was concerned that Respondent was unable to attract new employees, and the inability was having a deleterious impact on the working conditions of employees who, as Respondent was understaffed, were asked to work overtime. The Union requested an opportunity to negotiate increased starting wages with the purpose of establishing more competitive wage rates. The union also told Respondent that it believed there had been some instances of increased wages being given to some new hires, and the Union wanted to pursue that issue and bargain about it with the object of equalizing such wage rates. The Union requested bargaining about wage increases for the rest of the bargaining unit as well, on at least an interim basis, because of concern about Respondent's ability to compete for new nursing graduates.

During negotiations, the Union made a base proposal for general wage increases and engaged in discussion about wages generally throughout various bargaining sessions. However, according to Mr. Ford, the Union's general wage proposal was modified during the March to April period to include an interim increase proposal specifically directed at improving Respondent's' ability to recruit new employees. Mr. Ford testified that Respondent's negotiating representatives declined to make any response to the proposals regarding interim increases or to participate in the requested discussion.[21]

Respondent maintains a salary range for newly hired registered nurses. Since June 28, 1999, registered nurses with experience have been hired at a starting wage rate ranging between #18.15/hour and $25.41/hour.[22] The salary for graduate

[18] That position is consistent with the general tenor of Ms. DeVault's testimony that at least some rules regarding written notice of shift change existed prior to the election.

[19] Inasmuch as the General Counsel's sole witness to employee noncompliance is not credible, there is no clear evidence that employees generally disregarded Respondent's shift change policies. The absence of supervisors' initials next to most schedule changes does not, without explanation, prove that the uninitialed changes were effected without prior written notice, particularly since, after the December 28, 1999 notice of the preapproval requirement, half of the changes were still uninitialed. The General Counsel subpoened signed shift change slips, but Respondent maintained it did not keep the slips. There is no evidence to contradict Respondent's assertion and no presumption that the slips are documents that would likely be kept in the normal course of business; therefore, no adverse inference can be drawn from the nonexistence of signed change slips.

[20] *Caterpillar, Inc.*, 321 NLRB 1178 (1996), cited by the General Counsel is inapposite. In that case, unlike the instant situation, there was clear evidence that the employer both announced and instituted stricter enforcement of existing work rules.

[21] During Mr. Ford's testimony in this regard, Counsel for Respondent pressed him to admit that there had been discussion about wages during negotiations. Mr. Ford agreed that there had been discussion of wages generally but consistently testified that as to the Union's proposal for interim wage increases specifically geared to make Respondent competitive among the upcoming nurse graduates, Respondent declined to discuss it and "rebuffed" attempts to do so. There is no evidence to the contrary, and I found Mr. Ford to be a forthright and credible witness. I accept his testimony.

[22] The latest range was established June 28, 1999, and it is not contended that the establishment of the range violates the Act.

nurses is set at a flat rate $15.41/hour rising to $18.15/hour when they pass their examinations. For the registered nurses whose work background qualifies them for wage consideration within the established wage range, Respondent follows specific guidelines in setting their wages. The wage range is divided into quartiles. The individual department's hiring manager and the Human Resources Department jointly determine an appropriate rate of pay based on the applicant's qualifications, experience, specialty certifications, and the internal equity of the department.[23] If the department manager and the human resource officer determine that the quartile into which the applicant most appropriately falls based on the above considerations is the first quartile ($18.15 to $19.97), the hiring manager then assigns a specific rate. If the wage rate deemed appropriate for an applicant falls into the second, third, or fourth quartile, the hiring manager must obtain approval from the human resources department and the vice president of nursing for the specific wage rate.[24] The same procedure is followed for part time and per diem nurses, except that the latter receive fifteen percent added to their base pay in lieu of benefits. This policy and procedure of setting wage rates has been followed consistently at all times material to this matter.

The General Counsel argues that while the framework devised by Respondent for setting wage rates for new hires antedated the Union election, Respondent had an obligation to bargain with the Union over the discretionary aspects of the procedure, i.e. the amount of the starting rate within the specified range. As noted, Respondent applies precise criteria for determining which quartile a prospective employee qualifies for, but determining the wage rate within that quartile is discretionary. The first quartile—into which most newly hired employees fit—has a range of $18.15 to $19.97. The other quartiles also have hourly wage ranges. Respondent has unfettered discretion over the amount it will set for a newly hired employee within the appropriate quartile. The General Counsel does not contend that Respondent's procedure whereby it determines beginning wages has altered in any way, but contends that since Respondent has discretion over where in the quartile range it will fix a starting salary, it must bargain with the Union over that determination.

Respondent asserts that it does not exercise "unlimited" discretion in setting the starting rates of newly-hired unit employees, that it follows established detailed procedures, and that the General Counsel must show the procedure is followed inconsistently or ignored before a violation of 8(a)(5) can be proven. I cannot agree with Respondent.

In *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1973), involving an employer's annual review of employees to determine the amount of a merit increase, the Board stated: An employer with a past history of a merit increase program neither may discontinue that program…nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected…What is required is a maintenance of preexisting practices, i.e. the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.

Here, Respondent did not alter its starting wage assessment procedure, but refused to bargain with the Union over its discretionary placement of new employees within the fixed quartile range. Since the procedure, by its terms, established a discretionary wage range, the starting wage rate was "in no sense automatic, but [was] informed by a large measure of discretion,"[25] and the Union was entitled to bargain over the wage rate selection. Thus, Respondent failed to bargain over the implementation of its practice as required by *Oneita Knitting* in violation of Section 8(a)(5) and (1) of the Act. [26]

Respondent argues that the Union waived its right to bargain regarding the starting wage rates of newly hired nurses. The evidence clearly shows otherwise. The Union consistently expressed a concern over the starting wages of unit employees particularly as it had a direct impact on the workload of current unit employees. The Union made several requests to bargain over the starting wages, all of which were refused by Respondent.

As the issue of starting wage rates for unit employees had a material and substantial impact on unit employees' wages, hours and conditions of employment, and as Respondent has failed to show that the Union had no right to bargain in this regard, I find that Respondent's refusal to bargain over the pay rates of new hires violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time Registered Nurses, including graduate nurses awaiting licensing, and Per Diem nurses (all nurses who have worked an average of at least 4 hours a week during the quarter prior to the eligibility date), employed by Respondent at its facility located at 75 and 77 Pringle Way, Reno, Nevada; excluding all other employees, managerial employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. On July 14, 15, and 16, 1999, in an election by secret ballot, conducted under the supervision of the Regional Director

[23] This refers to wage rates of other registered nurses employed in the department to which the applicant will be assigned.

[24] Respondent's pay records show that for the period January 1, 1999 through August 2000, 56 percent of the new hires were started at wage rates above the base pay.

[25] *NLRB v. Katz*, 369 U.S.736 (1962).

[26] *In The News Journal Co.*, 331 NLRB No. 177 (2000), the Board found no violation of 8(a)(5) in an employer's failure to give merit wage increases inasmuch as the employer maintained its existing practice of using a number of factors including the discretion of the editor in deciding whether an increase would be given. That case differs from the instant situation. Here, the existing procedure had a built-in discretional range for determining starting salaries. Once the quartile was arrived at by application of a number of factors, the decision as to what rate to apply was purely discretional.

for Region 32 of the Board, a majority of the employees in the unit described in paragraph 3 above designated and selected the Union as their representative for the purpose of collective bargaining with Respondent with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. On October 21, 1999, the Union was certified as the exclusive collective bargaining representative of the employees in the unit described in paragraph 3 above. Since December 1, 1999, Respondent and the Union have been engaged in negotiations for a collective-bargaining agreement covering employees in the above unit.

6. At all times since October 21, 1999, the Union has been and is, the representative of a majority of the employees in the unit described in paragraph 3 above, for the purpose of collective bargaining, and, by virtue of Section 9 (a) of the Act, has been, and is, the exclusive representative of all employees in said unit for the purpose of collective bargaining.

7. By unilaterally and without notice to or consultation with the Union, setting starting wage rates for newly hired employees in the unit described in paragraph 3 above, commencing on or about November 1, 1999, Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act..

8. The General Counsel failed to prove that Respondent engaged in any unfair labor practice on or about December 28, 1999, in connection with administering its policy of allowing employees in the unit described in paragraph 3 above to trade shifts.

9. The General Counsel failed to prove that Respondent engaged in any unfair labor practice commencing on or after July 16, 1999, in connection with issuing discipline to employees in the unit described in paragraph 3 above.

10. The General Counsel failed to prove that Respondent engaged in any unfair labor practice on or about November 29, 1999, December 8 and 28, 1999, January 18, 2000, March 14, 2000, and April 12, 2000, in connection with issuing discipline to employee Terry DeVault.

REMEDY

Because Respondent's unilateral setting of wage rates for newly hired employees carries no pecuniary detriment to the employees, no make-whole order is required. However, having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, Washoe Medical Center, Inc., of Reno, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally, and without consultation with the Union, setting starting wage rates for newly hired employees in the unit described in paragraph 3 above,

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning setting starting wage rates for newly hired employees and, if an understanding is reached, embody the understanding in a signed agreement:

(b) Within 14 days after service by the Region, post at its facilities in Reno, Nevada, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2000.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by the Union, if willing, at all places where notices to its members and employees it represents are customarily posted. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: December 14, 2000

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally set starting wage rates for newly hired employees in the following unit without first providing

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Operating Engineers Local no. 3, International Union of Operating Engineers, AFL–CIO, notice and an opportunity to bargain.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL , before setting starting wage rates for newly hired employees, notify and, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time Registered Nurses, including graduate nurses awaiting licensing, and Per Diem nurses who have worked an average of at least 4 hours a week during the quarter prior to the eligibility date), employed by Respondent at its facility located at 75 and 77 Pringle Way, Reno, Nevada; excluding all other employees, managerial employees, guards, and supervisors as defined in the Act.

WASHOE MEDICAL CENTER, INC.